

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of:)	
)	
Kansas City Cable Partners)	CSR-5993-E
)	
Petition for Determination of Effective)	
Competition in Overland Park, Kansas (KS0064))	
)	

MEMORANDUM OPINION AND ORDER

Adopted: February 3, 2003

Released: February 5, 2003

By the Deputy Chief, Media Bureau:

I. INTRODUCTION

1. Kansas City Cable Partners ("KCCP") has filed with the Commission a petition ("Petition") pursuant to Sections 76.7, 76.905(b)(4) and 76.907 of the Commission's rules seeking a finding of effective competition in Overland Park, Kansas ("Overland Park"). KCCP alleges that its cable system serving Overland Park is subject to effective competition pursuant to Section 623(a)(2) of the Communications Act of 1934, as amended ("Communications Act"),¹ and the Commission's implementing rules,² and seeks revocation of the certification of the local franchising authority in Overland Park to regulate basic cable service rates. KCCP claims the presence of effective competition in Overland Park stems from the competing services provided by Everest Midwest Licensee ("Everest"), a franchised cable operator that also provides local exchange carrier ("LEC") service in Overland Park.³ Everest filed a Response to the Petition and KCCP filed a Reply.

II. DISCUSSION

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,⁴ as that term is defined by Section 76.905 of the Commission's rules.⁵ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present within the relevant franchise area.⁶ Based on the

¹ 47 U.S.C. § 543(a)(2).

² 47 C.F.R. § 76.905.

³ 47 U.S.C. § 543(a); 47 C.F.R. § 76.905(b)(4).

⁴ 47 C.F.R. § 76.906.

⁵ 47 C.F.R. § 76.905.

⁶ See 47 C.F.R. §§ 76.906-907.

record in this proceeding, KCCP has met this burden.

3. Section 623(l)(1)(D) of the Communications Act provides that a cable operator is subject to effective competition, and therefore exempt from cable rate regulation, if a LEC or its affiliate offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, provided the video programming services thus offered are comparable to the video programming services provided by the unaffiliated cable operator in that area.⁷

4. The Commission has stated that an incumbent cable operator could satisfy the LEC effective competition test by showing that the LEC is technically and actually able to provide services that substantially overlap the incumbent operator's service in the franchise area.⁸ The incumbent also must show that the LEC intends to build out its cable system within a reasonable period of time if it has not already done so, that no regulatory, technical or other impediments to household service exist, that the LEC is marketing its services so that potential customers are aware that the LEC's services may be purchased, that the LEC has actually begun to provide services, the extent of such services, the ease with which service may be expanded and the expected date for completion of construction in the franchise area.⁹

5. KCCP operates a cable television system in Overland Park for which it seeks a determination of effective competition. KCCP has provided information demonstrating that Everest is a telephone company that provides local exchange and other telephone services within Overland Park.¹⁰ Therefore, Everest qualifies as a LEC for purposes of the LEC effective competition test.¹¹

6. In addition to qualifying as a LEC, Everest was awarded a franchise for the provision of cable service within Overland Park.¹² KCCP states that Everest is required by its franchise to fully construct its system such that its plant passes 100 percent of all households before December 3, 2006. KCCP estimates that Everest already passes approximately 9,203 homes, over 15.4 percent of the more than 59,703 Census 2000 households in Overland Park.¹³ KCCP also states that Everest's franchise states that Everest must build out its system within five years or it will face monetary penalties chargeable against a \$200,000 performance bond.¹⁴ KCCP asserts that Everest's current level of buildout is more than sufficient for the Commission to immediately deem its cable system subject to effective competition.¹⁵

7. Everest claims that it faces impediments to rolling out its service in Overland Park. It

⁷ 47 U.S.C. § 543(1)(1)(D); *see also* 47 C.F.R. § 76.905(b)(4). This fourth statutory effective competition test within Section 632(l) is referred to as the "LEC" effective competition test.

⁸ *See Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296, 5305 (1999) ("Cable Reform Order").

⁹ *Id.*

¹⁰ Petition at 2.

¹¹ *See* 47 U.S.C. § 543(1)(1)(D); 47 U.S.C § 153(a)(1).

¹² Petition at 4.

¹³ *Id.*

¹⁴ *Id.* at 6, Exhibit C.

¹⁵ Reply at 2.

states that, as of October 1, 2002, it passed 15,337 homes, or approximately 25 percent of the homes in Overland Park.¹⁶ Everest asserts that it has had difficulty building out its system because of pole attachment disputes with Southwestern Bell as well as street trenching difficulties with the local gas utility.¹⁷ Everest also asserts that it cannot wire many multiple dwelling units (“MDUs”), as much as 10 percent of the households in the city, because local landlords have signed exclusive service agreements with KCCP, DirecTV, or Southwestern Bell.¹⁸ Everest adds that it has only promoted itself in areas of the City in which it has built out and has not engaged in any type of mass media advertising campaign because it cannot deliver its service before it becomes available.¹⁹

8. Notwithstanding Everest’s arguments, KCCP demonstrates that there are no regulatory, technical or other impediments to Everest’s provision of cable service within Overland Park.²⁰ While Everest may have had difficulties in building its cable system due to disputes with local utilities, as well as exclusive agreements with certain MDUs, it does not claim that it will be unable to fulfill its franchise obligations by 2006.²¹ This point, combined with Everest’s existing availability to nearly 25 percent of households in the franchise area, evinces its offering of competitive multichannel video service to households in Overland Park.²² Under these circumstances, we find that KCCP has demonstrated that Everest’s operations in the franchise area substantially overlap those of KCCP.²³

9. Everest has widely distributed marketing materials in Overland Park, pointing out that residents need only call Everest for installation in areas where it has activated its service.²⁴ Moreover, Everest’s competitive video service, as KCCP attests, has been widely reported in the local media, including the *Kansas City Star*, *Johnson County Sun*, and *Business Journal* of metropolitan Kansas City.²⁵ Such news coverage enhances consumer awareness of Everest as an available MVPD alternative to KCCP in Overland Park. In addition, Everest’s marketing materials demonstrate that its cable service offers over 200 channels of video programming that includes non-broadcast programming services such as ESPN, HBO, CNN, as well as a complement of local television broadcast stations, such as KSHB (NBC), KMBC (ABC), and KCTV (CBS).²⁶ Therefore, Everest provides comparable programming as required by the LEC effective competition test. Finally, KCCP states it has recently made major improvements to its system in response to the competitive pressures posed by Everest and DBS providers.²⁷ KCCP explains that it has fully upgraded

¹⁶ Everest Response at 2.

¹⁷ *Id.* at 3.

¹⁸ *Id.* at 5.

¹⁹ *Id.* at 6.

²⁰ Petition at 5.

²¹ Pole attachment disputes and street trenching difficulties are buildout issues common to all wireline operators, and are not unique to Everest’s situation in Overland Park.

²² Petition at 4.

²³ We note that the competitive presence of Everest in Overland Park when combined with existing DBS service would also be sufficient to establish competing provider effective competition in KCCP’s Overland Park franchise area.

²⁴ Petition at 8 and Exhibit A, F, and G.

²⁵ Reply at 7.

²⁶ *Id.* at 9, Exhibit A.

²⁷ *Id.*

its system and is offering new channels of programming, cable modem service, home networking, HDTV, as well as video-on-demand. These services, which are an outgrowth of competition, benefit subscribers and support our decision to grant KCCP's petition.

10. Everest argues that neither KCCP nor any other incumbent cable operator should be permitted to offer geographically non-uniform prices before receiving a determination that it is subject to effective competition. Everest alleges that KCCP is illegally offering deeply discounted rates in only those areas where Everest's service is currently available.²⁸ Everest requests that the Commission issue a cease and desist order against KCCP barring the company from providing special rates to those living in Everest's service area until after the agency issues its ruling.²⁹ Given that we have found KCCP to face effective competition in Overland Park, we need not address Everest's request for a cease and desist order.³⁰

11. KCCP has demonstrated that Everest has commenced providing cable service within Overland Park, has marketed its services in a manner that makes potential subscribers reasonably aware of its services, and otherwise satisfied the LEC effective competition test consistent with the evidentiary requirements set forth in the *Cable Reform Order*.³¹ Based on the foregoing, we conclude that KCCP has submitted sufficient evidence demonstrating that its cable system serving Overland Park is subject to LEC effective competition.

III. ORDERING CLAUSES

12. Accordingly, **IT IS ORDERED** that the petition filed by Kansas City Cable Partners for a determination of effective competition in Overland Park, Kansas **IS GRANTED**.

13. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates of Overland Park, Kansas **IS REVOKED**.

14. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.³²

FEDERAL COMMUNICATIONS COMMISSION

William H. Johnson
Deputy Chief, Media Bureau

²⁸ Everest Response at 8.

²⁹ *Id.*

³⁰ If Everest believes that KCCP, or any other cable operator not subject to effective competition, is illegally offering non-uniform rates, it can file a complaint with the Commission. See 47 C.F.R. § 76.984. Indeed, Everest has filed such a complaint involving another franchise area. See *Everest Midwest Licensee, LLC d/b/a Everests Connections Corp. v. Kansas City Cable Partners d/b/a Time Warner of Kansas City*, CSR No. 5845 (pending).

³¹ See *Cable Reform Order*, 14 FCC Rcd at 5305.

³² 47 C.F.R. § 0.283.